

**Troy D. Greenfield**, OSB #892534

Email: tgreenfield@schwabe.com

**Joel A. Parker**, OSB #001633

Email: jparker@schwabe.com

**Jeffrey S. Eden**, OSB #851903

Email: jeden@schwabe.com

**Alex I. Poust**, OSB #925155

Email: apoust@schwabe.com

**Lawrence R. Ream** (Admitted *Pro Hac Vice*)

Email: lream@schwabe.com

Schwabe, Williamson & Wyatt, P.C.

Pacwest Center

1211 SW 5th Ave., Suite 1900

Portland, OR 97204

Telephone: 503.222.9981

Facsimile: 503.796.2900

**Ivan B. Knauer** (Admitted *Pro Hac Vice*)

Email: knaueri@pepperlaw.com

**Brian M. Nichilo** (Admitted *Pro Hac Vice*)

Email: nichilob@pepperlaw.com

Pepper Hamilton, LLP

600 14<sup>th</sup> Street, NW, Suite 500

Washington, DC 20005

Telephone: 202.220.1219

Facsimile: 202.220.1665

Attorneys for the Receiver for Defendants

AEQUITAS MANAGEMENT, LLC; AEQUITAS HOLDINGS, LLC;

AEQUITAS COMMERCIAL FINANCE, LLC; AEQUITAS CAPITAL

MANAGEMENT, INC.; AEQUITAS INVESTMENT MANAGEMENT, LLC

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PORTLAND DIVISION

SECURITIES AND EXCHANGE  
COMMISSION,

Plaintiff,

v.

No. 3:16-cv-00438-PK

MOTION TO AUTHORIZE RECEIVER TO  
ESTIMATE VALUE OF PROMISSORY  
NOTES FOR IRA ACCOUNT HOLDERS  
UPON REQUEST

AEQUITAS MANAGEMENT, LLC;  
AEQUITAS HOLDINGS, LLC;  
AEQUITAS COMMERCIAL FINANCE,  
LLC; AEQUITAS CAPITAL  
MANAGEMENT, INC.; AEQUITAS  
INVESTMENT MANAGEMENT, LLC;  
ROBERT J. JESENIK, BRIAN A. OLIVER;  
and N. SCOTT GILLIS,

Defendants.

### **LOCAL RULE 7-1 CERTIFICATE**

On November 2, 2016, counsel for the Receiver circulated to counsel of record, via e-mail, a copy of this motion that is substantially the same as this filed version. The conferral requested that counsel respond by 12:00 p.m. (PST) on November 3, 2016, as to whether their clients object or consent to the motion. As of the time of filing this motion, the undersigned had received no objections.

### **MOTION**

The Receivership entities issued promissory notes, some of which are held by individuals through their Individual Retirement Accounts (“IRAs”). Some such individuals must take annual distributions from their IRAs in proportion to the account’s value, which depends on the value of those promissory notes. For the reasons further set forth below, this Court should expressly authorize the Receiver to estimate the value of promissory notes issued by a Receivership entity for any individual who makes a showing to the Receiver that he or she: (a) holds such promissory notes through an IRA; and (b) must take a distribution from that account.

**I. Individuals over age 70½ are required to take annual distributions from IRA accounts in relation to the account's value, which requires information about the value of promissory notes held in the account.**

An IRA trustee, custodian, or annuity issuer is required to file an annual report with the Internal Revenue Service for each person for whom it maintained an IRA in the prior tax year. Such an annual report includes, among other information, the value of the assets held in the IRA in the prior tax year. *See* LOREN WHITNEY, TAX DEFERRED—PROMISSORY NOTE SELF-DIRECTED IRA INVESTING, *available at* <http://www.promissorynoteappraisers.com/tax-deferred-promissory-note-self-directed-ira-investing/> (last visited Oct. 26, 2016). Valuation issues can arise when active investors decide to invest their retirement plan in promissory notes using a funded self-directed IRA. *Id.* When investing in promissory notes, an IRA holder may be required to provide the custodian or administrator with valuation documentation. *Id.*

When a loan fails to perform, the valuation of a promissory note may vary year-over-year—a significant issue for notes held in an IRA. An IRA beneficiary is required to receive a minimum distribution from his or her IRA once he or she reaches the age of 70½ in an amount that is calculated on life expectancy tables and the value of the IRA. *See* INTERNAL REVENUE SERVICE, *Publication 590-B (2015), Distributions from Individual Retirement Arrangements (IRAs)*, Ch. 1, *available at* <https://www.irs.gov/publications/p590b/ch01.html> (last visited Oct. 26, 2016). If the value of the note is lower than the face, the required minimum distribution can potentially be overstated. In the event that a note has a reduced value, it is the obligation of the IRA holder to prove its reduced value, thus enabling the provider to adjust the IRA balance accordingly, as well as the IRA beneficiary's required minimum distribution amount. *See* WHITNEY, TAX DEFERRED—PROMISSORY NOTE SELF-DIRECTED IRA INVESTING.

An IRA account holder who wishes to prove the reduced value of a note has a variety of options, including obtaining a detailed letter signed by the manager of a borrowing entity explaining the determination of a reduced value. *Id.*

**II. Several individuals have requested that the Receiver estimate the value of promissory notes held by them through their IRAs.**

The Receiver has been asked by representatives for several IRA account holders to provide estimated values of notes issued by the Receivership entities. Such investors could theoretically obtain an estimate from other sources, including a note appraiser, CPA, or licensed attorney certifying and explaining the reduced value of the asset. *Id.* But such a third-party appraisal would likely require individual IRA account holders—who are already past the age of retirement and may be on fixed incomes—to incur additional costs. The Receiver is sympathetic to such investors, including one whose IRA holdings consist entirely of such a promissory note.<sup>1</sup> In the absence of other assets, this investor, who is over age 70½, must take a partial distribution of the promissory note, but cannot do so without first obtaining a fair-market valuation of her note. That investor will owe tax penalties unless such a partial distribution is made.

**III. This Court should expressly authorize the Receiver to estimate the value of promissory notes for a limited category of investors.**

The Receiver likely already possesses the authority to provide estimates to individuals over age 70½ who hold promissory notes from Receivership entities through their IRAs. (*See* Order Appointing Receiver [dkt # 156], ¶ 27 (“The Receiver is authorized to take all actions to manage, maintain, and/or wind-down business operations of the Receivership Entity, including

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<sup>1</sup> Out of respect for the investor’s privacy, the Receiver is not identifying the investor by name or attaching the communication. The Receiver will supply that information if requested by the Court.

making ... communicating with ... investors ... as appropriate.”). However, out of an abundance of caution and to ensure that the Receiver is entitled to the liability limitations and protections afforded by the Court (*see id.* at ¶ 34-37), the Receiver seeks express authorization to estimate the value of notes for such individuals (*see id.* at ¶ 6 (“[T]he Receiver shall have the following general powers and duties ... [t]o take such other actions as may be approved by this Court.”)).

In order to provide such estimates, the Receiver anticipates relying upon the same valuation analysis previously provided to the Investors Advisory Committee—an estimated range of recovery—with the overlay of a hypothetical distribution plan based solely on the books and records as currently understood. Any such estimate would necessarily be accompanied by disclaimers, including that the hypothetical plan has no relevance or use beyond providing estimates to this limited class of investors and that the creation of, use of, reliance upon, or failure to object to such a hypothetical plan cannot be used in any way in this action against the Court, the Receiver, the investor receiving the estimate, or any other investor, creditor, or debtor.

### CONCLUSION

For the reasons set forth above, this Court should grant the Receiver’s motion to expressly authorize the Receiver to estimate the value of the promissory notes issued by a Receivership entity for any individual who makes a showing to the Receiver that he or she:

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(a) holds such promissory notes through an IRA; and (b) must take a distribution from that account.

Dated this 9<sup>th</sup> day of November, 2016.

Respectfully submitted,

SCHWABE, WILLIAMSON & WYATT, P.C.

By: s/ Troy D. Greenfield  
Troy D. Greenfield, OSB #892534  
tgreenfield@schwabe.com  
Joel A. Parker, OSB #001633  
jparker@schwabe.com  
Jeffrey S. Eden, OSB #851903  
jeden@schwabe.com  
Alex I. Poust, OSB #925155  
apoust@schwabe.com  
Lawrence R. Ream (Admitted *Pro Hac Vice*)  
lream@schwabe.com  
Telephone: 503.222.9981  
Facsimile: 503.796.2900

Ivan B. Knauer (Admitted *Pro Hac Vice*)  
knaueri@pepperlaw.com  
Brian M. Nichilo (Admitted *Pro Hac Vice*)  
nichilob@pepperlaw.com  
PEPPER HAMILTON LLP  
600 Fourteenth Street, N.W.  
Washington, DC 2005  
Tel: (202) 220-1665

Attorneys for the Receiver for Defendants  
Aequitas Management, LLC, Aequitas  
Holdings, LLC, Aequitas Commercial  
Finance, LLC, Aequitas Capital  
Management, Inc., and Aequitas Investment  
Management, LLC